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423901—57

In the Supreme Court of the United States

OCTOBER TERM, 1956

No. 596

UNITED STATES OF AMERICA, PETITIONER

v.

WALTER KORPAN

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

The respondent argues in Point III of his brief (pp. 41–43) that the government did not at the trial prove a *willful* failure to pay the tax. The basis for this argument is that the application of Section 4462 of the Internal Revenue Code of 1954 to the type of machine in operation on respondent's premises had not been adjudicated and is still in dispute. The respondent now contends that, because of the existence of this legal issue and because of the asserted failure of the Internal Revenue Service to enforce the tax with respect to this type of machine, the failure to pay the tax cannot be deemed willful. In support of this proposition, he cites *United States* v. *Murdock*, 290 U. S. 389, and *United States* v. *Kahriger*, 210 F. 2d 565 (C. A. 3).

In the *Murdock* case, the defendant had refused to supply information to the Bureau of Internal Revenue as to the persons to whom he claimed to have made payments which were listed as deductions in his return. His refusal was based on a claim of self-incrimination because of the possibility of prosecution under state laws. In *United States* v. *Murdock,* 284 U. S. 141, this claim was overruled. The defendant went to trial before a jury. The trial judge refused to instruct the jury that, if the refusal to give the information was made in good faith on the basis of an actual belief that the protection of the Fifth Amendment applied, the defendant could not be found guilty of a willful refusal to answer. This Court found that this was error, holding that a person could not be held criminally liable for willful failure to comply if he acted pursuant to a *bona fide* misunderstanding as to his liability (290 U. S. 389, 396).

Following this holding, the United States Court of Appeals for the Third Circuit held in *United States* v. *Kahriger,* 210 F. 2d 565, that; where a refusal to register as a gambler and to pay the occupational tax was similarly based upon a mistaken claim pursuant to the Fifth Amendment, there was no basis for a finding of willfulness. In that case the failure to pay the tax was directly related to the refusal to register since it was stipulated that the Collector would not permit the payment of the tax in the absence of registration (210 F. 2d 565, 567).

These two cases are inapplicable to the present case both on a factual and a legal basis.

1. In both *Murdock* and *Kahriger*, the defendants' refusals to comply with provisions of the Internal Revenue Code were, at the time of the refusals, specifically based on claims of privilege under the Fifth Amendment. Mistaken though these claims proved to be, they were the explicit basis for the defendants' action. Here, in contrast, the government proved, and the trial court found, a *willful* failure to pay the tax in the sense that the respondent stated that he understood that the tax was applicable to him and yet failed to pay it. There was no evidence whatsoever of a claim by respondent at the time of the offense that the tax was not applicable to the machines involved. That issue was later injected into the trial as a defense, but no evidence was introduced that such was the actual reason for the failure to pay the tax.

The evidence shows that, before the commencement of the tax year involved, the respondent was visited by a special agent of the Intelligence Division of the Internal Revenue Service who warned him that if he used the machines as gaming devices he would be subject to the $250 tax (R. 13–15). The respondent denied that he was making cash payments on the machines and stated that he understood the requirements as explained to him (R. 15). Other witnesses then testified that, later, they won replays on the machines which the respondent redeemed in cash (R. 18–20; 28–29). The special agent who uncovered the violation, after warning respondent of his right to remain silent, asked him whether he had been told of the interpretation of the Act, whether he understood his obligation, and whether he had been paying out cash

all along (R. 30). The respondent admitted that he had received the instructions and understood them, and that he had been paying cash at the time he denied it (R. 30). Thereafter, the respondent paid a $250 tax on each of the three machines and a penalty of $75 for late payment (Gov. Ex. 2, R. 93). The respondent did not claim at the time the offense was called to his attention, nor has he since asserted, that he did not pay the tax because he thought it was not applicable to him. To be sure, his counsel has argued, and still does, that the tax does not apply to these particular machines, but he has presented no evidence that the failure to pay was based on that belief.

We submit that this is a very different factual situation from that present in *Murdock* or *Kahriger* where the refusal to comply was, at the time of the refusal, directly related to the legal issue in dispute.

2. There is also a clear legal distinction between *Murdock* and *Kahriger* and this case. In those cases, the normal way, and in fact the only way, the defendants could have protected themselves against self-incrimination, if they had in fact any rights in that respect, would have been to refuse to give the information and to refuse to file the registration form. If their belief that they were entitled to the privilege had been justified, their rights would have been lost if

they had made the required disclosures, whether or not they had attempted to reserve their legal rights. Here, on the contrary, the proper way for the respondent to protest the tax was to pay the tax and then petition for a refund (26 U. S. C., Supp. III, 7422). Even if he had been right that the tax was not applicable, his remedy was not to refuse to pay.

The proper interpretation of the term "willful" as it is used in the statute making the willful failure to pay a tax a misdemeanor was explained by this Court in *Spies* v. *United States,* 317 U. S. 492 at 497–499. There, the Court distinguished between a positive attempt to evade taxes, which was made a felony, and "willful but passive neglect" which was made a misdemeanor. Cf. *United States* v. *Illinois Central Railroad Co.,* 303 U. S. 239, 243; *Boyce Motor Lines* v. *United States,* 342 U. S. 337, 340.

Here, instead of a defendant protecting what he considers to be his constitutional rights, we have an individual, who has been warned as to the application of the law to his situation, attempting through concealment to avoid the tax. Even if he should eventually be upheld in the interpretation his attorney now urges, concealment of his operations and a flagrant disregard for his apparent obligation was not the appropriate method of protecting his right.

For these reasons, we urge that respondent's argument that the government failed to establish a willful failure to pay is without merit.

Respectfully submitted.

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